No. 3791.

United States Circuit Court of Appeals For the Ninth Circuit

ASMA RUBAIZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT & POWER COMPANY, a Corporation, TUCSON RAPID TRANSIT COMPANY, a Corporation, THE INTERNATIONAL TRUST COMPANY, a Corporation, and EDWIN F. JONES, as Receiver,

Appellees.

BRIEF OF APPELLEES, INTERNATIONAL TRUST COMPANY AND TUCSON GAS, ELECTRIC LIGHT & POWER COMPANY

Upon Appeal from the United States District Court for the District of Arizona

S. L. KINGAN,
JOHN H. CAMPBELL,
A. R. CONNER,
Tucson, Arizona,
Attorneys for Appellees.

Filed this ..... day of January, 1922.

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Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Service of two copies of within Brief of Appellees is hereby acknowledged this.....day of January, 1922.

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Attorneys for Appellant, Asma Rubiaz.

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STATEMENT OF CASE

Although appellant has made a statement of facts, we consider it essential to make a further statement in order that the court may be advised more fully of the precise matters in controversy.

At the time the receiver was appointed for the Transit Company, in 1919, the following conditions existed:

The Transit Company was the owner of about four miles of street railway, a few cars, and a city lot on which the car barn was situated. It owned no other property. In 1906 it had executed a deed of trust to the International Trust Company upon all of the property it then had or might thereafter acquire, including revenues, profits and incomes, to secure a bond issue. Of this issue, $114,000 had been sold and were held by various persons. No interest had been paid since 1907, and it had accumulated to the extent of approximately $70,000.00. In 1915, or thereabouts, the Light Company had loaned the Transit Company $60,000.00, none of which had been paid. In 1918, the appellant Rubaiz had obtained a judgment in the trial court for $4500.00, and the case was on appeal to the Supreme Court of the State. The franchise of the Transit Company requires it to pave between the rails and one foot on the outside of same whenever the city paves a street, and upon its failure to do so the city reserves the right to forfeit the franchise. At the time the receiver was appointed, a street occupied by the Transit Company was about to be paved. The company had no funds except about $100.00, which it turned over to the Receiver. (Tr. p. 42).

The receiver took charge of the property and by reason of the fact that he used the equipment without replacements or work upon the roadbed, and an increase of fare, accumulated by May, 1920, a fund of approximately $8,000.00. (Tr. p. 42). In the meanwhile, the judgment of the trial court in the Rubaiz case had been af-

firmed by the Supreme Court of the State, and the appellant had intervened in the receivership proceedings, claiming a first lien on the personal property of the Transit Company, and the right to have her judgment satisfied out of the fund in the receiver's possession. Also the International Trust Company had intervened, setting up the deed of trust, and asking that all moneys derived from the operation of the property be paid to it to apply upon the indebtedness, and the receiver hold the property for it.

At this time, May, 1920, appellant, as intervenor, made three several motions, (1) to dismiss the complaint in intervention of the International Trust Company; (2) to strike the answer of the Light Company to the complaint in intervention of the appellant, and (3) to strike the answer of the Transit Company to the complaint in intervention of the appellant. The motions (Tr. ps. 133-141, inc.), in greater detail are: The motion to dismiss the complaint in intervention of the International Trust Company is on the grounds that the complaint does not state facts sufficient to entitle the Trust Company to a lien prior or superior to the lien of the intervenor Rubaiz on the money or personal property of the Transit Company; because the complaint does not state facts sufficient to entitle the Trust Company to any equitable relief involving the money or personal property of the Transit Company in the hands of the receiver as against the lien of the intervenor Rubaiz, and because the complaint of the Trust Company is seeking only to

have the property or assets of the Transit Company used for the protection and preservation of the property. The motion to strike the answer of the Transit Company is on the grounds that the answer does not state facts sufficient to entitle the Trust Company to a superior lien on the money or property of the Transit Company in the hands of the Receiver; because the answer does not state facts entitling the Trust Company to equitable relief as against the money or personal property of the Transit Company in the hands of the Receiver, and because the answer shows upon its face that the Transit Company is colluding with the Trust Company and the Light Company to have the assets of the Transit Company used for the protection and preservation of the property, and to defeat the claim of the intervenor Rubaiz. The motion to strike out the answer of the Light Company is on the grounds that the answer does not state facts sufficient to entitle the Trust Company to have a prior lien over the judgment lien of the intervenor Rubaiz; because the answer does not state facts sufficient to entitle the Trust Company to any equitable relief against the money or personal property of the Transit Company in the hands of the Receiver, and because the answer of the Light Company shows that it is colluding with the Trust Company and the Transit Company, to have the assets of the Transit Company used for the protection and preservation and enhancement of of the security of the Trust Company, and to defeat the claim and lien of the intervenor Rubaiz.

These were the motions before the court, the ruling upon which is the matter of appeal before this court. On their hearing no evidence was introduced, and the matter was submitted upon argument and reference to the pleadings, reports and various documents before the court, and all of which are contained in the transcript. It will be noted that no motions were made or other proceedings taken to terminate the receivership proceeding, or complaint made as to the receivership. Practically the entire matter went to one point, namely that intervenor Rubaiz was entitled to have paid to her the amount of her judgment out of the fund then in the hands of the Receiver, upon the theory that she had a superior lien upon the personal property of the Transit Company and the money in the hands of the Receiver.

The court held (Tr. ps. 173-178, inc.), briefly as follows: That all of the property of the Transit Company was real estate, and hence covered by the deed of trust; that the mortgage was in no wise a chattel mortgage, but a real estate mortgage, covering real estate, and hence, and in effect, that Sec. 3624, Revised Statutes of Arizona, 1913, giving priority to judgments for personal injuries over mortgages, had no application, as by the terms of the statute it did not apply to mortgages given before the passage of the statute; that under Equity Rule 37, intervenor Rubaiz, by her intervention, recognized the propriety of the original proceedings and was bound thereby, that is to say, the receivership was a proper proceeding; that as to the income in the hands

of the receiver, collected by him prior to the intervention of either party, that neither party had a lien thereon; that for the period between the dates that intervenor Rubaiz intervened and the Trust Company intervened, that intervenor Rubaiz was entitled to the income, and that thereafter the Trust Company was entitled to the income; that as the Mayor and Common Council of the City had ordered a street paved, and in order to preserve the franchise of the Transit Company, the receiver use the fund then in his hands for the purpose of paving.

From the judgment so rendered appellant has appealed to this court, and filed herein her assignments of error, seven in number. (Appellant's Brief, ps. 13 and 14). The assignments are of so general a character that it is next to impossible to ascertain from them the errors appellant complains of. The rule is that the assignments of error must be so complete and clear that the court may obtain therefrom a specific statement of the questions presented without reference to the brief or any other source outside of the assignments themselves. *Van Gunder v. Va. Coal & Iron Co.*, 52 Fed. 838, 3 C. C. A. 294; *Grape Creek Coal Co. v. Farmers Loan & Trust Co.*, 63 Fed. 891, 12 C. C. A. 350; *Fitch v. Richardson*, 147 Fed. 196, C. C. A. 1st Cir.; *Moline Trust & Savings Bank v. Wylie*, 149 Fed. 734, C. C. A. 8 Cir. Also rules 11 and 24 of this Court.

The first assignment of error, namely, that the court erred in finding the law against the intervenor, assigns

no error. The second assignment, namely, that the facts shown by the pleadings and documents entitled the intervenor to a decree in her favor, assigns no error. The third assignment, namely, that the finding and decree of the court are against the law and equity, assigns no error. The fourth assignment, namely, that the court erred in holding that the intervenor did not have a lien on the net income in the hands of the Receiver, given its most liberal interpretation, must be confined to the one point mentioned. The fifth assignment, namely, that the court erred in finding that the filing of the petition by intervenor Rubaiz did not create a lien in her favor on income theretofore accumulated, likewise can have no further application than assignment No. Four. The sixth assignment, that the court erred in not directing the Receiver to pay over to the intervenor Rubaiz an amount necessary to satisfy her claim, likewise can have no further application or be construed to include any additional error. The seventh assignment, namely, that the court erred in nor ordering a diversion of the net income in the hands of the Receiver to the payment of the intervenor's claim, adds nothing. It follows that the only assignment of error, giving the assignments the most liberal interpretation, goes only to the one point, namely, that the court erred in not ordering the Receiver to pay the intervenor the amount of her judgment from the funds then in the hands of the Receiver. Why this was an error, must be left to conjecture. No error is assigned or complained of as to

the propriety of the receivership proceedings or their termination, or of any alleged collusion, or of any act of the court in connection therewith.

All of the property of the Transit Company is real estate, is covered by the deed of trust of 1906, and Section 3634 of the Revised Statutes of Arizona of 1913 has no application.

It has been uniformly held by the Federal Courts that property essential to the operation of a railroad, including the rolling stock and other necessary movable appliances, are real estate. The principle is laid down in *Jones on Mortgages*, 7th Ed., Sec. 452, and the cases cited, as referred to by the trial court.

The deed of trust therefore of 1906 was a realty mortgage upon real estate, and the question of a chattel mortgage or of personal property is not involved.

Sec. 3634 of the Revised Statutes of Arizona, 1913, by its terms, applies only to mortgages or trust deeds executed after the passage of that act. Consequently, this section can have no application to the deed of trust in question here. The statute is:

> "A judgment against any railway corporation or street railway corporation or co-partnership for an injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and

superior to the lien of any mortgage or trust deed executed after this section takes effect."

All of the property of the Transit Company, being real estate, and covered by a real estate mortgage executed in 1906, the provisions of this section have no application, and the lien of the trust deed is superior to the statutory lien.

Equity Rule No. 37

Under this rule, providing that anyone claiming an interest in litigation may at any time assert his right by intervention, but that the intervention shall be in subordination to and in recognition of the propriety of the main proceeding, it must be that appellant cannot question the rightfulness and propriety of the action, nor maintain that there was any wrongful collusion either in the bringing or maintaining of the action.

ANSWERING THE ARGUMENT OF APPELLANT

Counsel for appellant divide their argument into two heads, one designated "Equities," and the other "The Net Income." We will take these up in the order counsel have treated them.

Counsel, at the outset, announce that it is their contention that the entire proceeding has but one objective, namely, to harrass, delay and prevent the appellant from the collection of her judgment. There are two

reasons why the contention of appellant should not be considered here: First, that they have assigned no error on this head, and second, that under Rule 37, they did, by intervening, admit the propriety of the proceedings.

But, notwithstanding that appellant is not entitled to be heard on this matter, we will briefly answer the argument advanced. There is no evidence, except inferences taken here and there from the various pleadings, reports of the Receiver and so on. Because of what is termed "Unity of Attorneys," it is inferred by appellant that collusion of necessity follows. It appears that Mr. Kingan, one of counsel here, acted at one time as attorney for the Transit Company; also that the firm of Kingan, Campbell & Conner are attorneys for the Light Company and also for the International Trust Company. There is no question in regard to this. It is perfectly true. But we fail to see that because Kingan, Campbell & Conner occupy the position of attorneys as set forth, that it follows that there is any collusion in this cause. As a matter of fact, Mr. Kingan has been attorney for the Light Company for approximately seventeen years last past, and at times during that period has acted for the Transit Company, and Kingan, Campbell & Conner are now the attorneys for the Light Company. The International Trust Company, knowing this fact, and there being no conflict between the Trust Company and the Light Company, Kingan, Campbell & Conner have acted for the Trust Company.

The claim of the Trust Company is that the mortgage executed to it in 1906 to secure bondholders is prior and superior to the claim of all other persons. This is admitted by the Light Company. The other inferences of appellant as to collusion are quite as far fetched as the foregoing. The International Trust Company, one of the largest institutions of its kind in the west, has no interest except to protect the interests of the bondholders. The Light Company, which is no more controlled by the Trust Company than the Trust Company is by it, only desires to protect its claims. As for the Transit Company, it is in the hands of the court, and cannot collude with anyone. If there was any collusion in this matter, and appellant desired to stand upon this point, evidence might have been taken and submitted to the trial court and the matter made an issue. This was not done.

As to the other matters discussed by counsel for appellant under the general head of their equities, and particularly their argument contained on pages 22 to 26, of their brief, namely, that the receivership should be terminated, we have only to say that this is an appellate court, and there having been no pleading or action of any kind taken below to terminate the receivership for any cause, and the matter never having been in any way presented to the trial court, that the matters complained of cannot be reviewed here.

The "equities" claimed by appellant appear to incline all in one direction, namely, the payment of her judg-

ment, even if by so doing the property of the Transit Company be wrecked. Notwithstanding that it is essential, in order to preserve the property in the hands of the Receiver, that the franchise be protectd by doing the necessary paving, appellant insists under her claim of "equities," that although destruction come about, and the bondholders lose their all, nevertheless she should be paid, and this in the face of the fact that her lien is second to that of the Trustee.

Next considering the second point of appellant, namely, "The Net Income."

The suit brought by the Light Company was a general creditor's suit. It was prayed that the Court take into its possession the property of the Transit Company, that all claims be ascertained and determined, that the assets be marshalled, priorities ascertained, and a Receiver be appointed with power to operate the railway, receive the income and dispose of the same as the Court should direct. (Tr. p. 9).

At the time the Receiver was appointed, the status of the Trust Company and of the appellant were: (a) The Trust Company had a first lien on all of the property of the Transit Company, including income; (b) Appellant, by reason of the judgment of the trial court, had a second lien on the property of the Transit Company.

We make this statement for the reason that the mortgage of 1906 covered all the property of the Transit Company; that all of the property was real estate,

including the cars (which are the only movable property of the company); that the statute of 1913, by its terms, only applies to mortgages made after its passage, and that, in the absence of statute giving them preference, judgments for damages are not preferred.

In *St. Louis Trust Co. v. Riley,* 16 C. C. A. 610, 70 Fed. 32, a claim for damages was denied preference on the ground that it was unnecessary expense. So, too, in *Farmers Loan & Trust Co. v. Detroit Co.,* 71 Fed. 29, a judgment in a negligence case was held not entitled to priority out of funds in the hands of a receiver before the mortgage was paid. In *Farmers Loan & Trust Co. v. Green Bay R. Co.,* 45 Fed. 664, a claim for causing death was held not entitled to priority against a fund in the hands of a receiver as against a mortgage. Also in *Ames v. Union P. R. Co.,* 74 Fed. 335, a judgment for negligence in the operation of the railroad was held not a superior lien to that of a mortgage. Also in *Foreman v. Central Trust Co.,* 18 C. C. A. 321, 71 Fed. 776, a judgment against a railroad company was held not to be a lien superior to a prior mortgage, although the judgment in the state court provided that the judgment should be a lien.

"It is well settled by the decisions of this and other courts that such claims (personal injuries) are not preferential debts." Judge Van Deventer, in *Atlantic Trust Co. v. Dana,* 128 Fed. 216.

The claim of appellant, therefore, is neither preferred by law nor by statute.

Such were the conditions when the Receiver took over the property. The fund now in question was not then in existence, and hence neither party had a lien on it, although the Trustee had a vested right by reason of the deed of trust to claim the income. As stated by Judge Van Deventer in the case already cited:

> "But a mortgage of income, even before it is made effective against future income in the sense just mentioned, gives to the mortgagee a vested right which cannot be displaced, postponed or impaired, in the interest or at the instance of an unsecured creditor, any more than can the mortgage lien upon the corpus of the property." Citing pages 226-227, 128 Fed.

Appellant, by her lien, obtained in 1918, could not obtain a higher right than the mortgagor then possessed. At the time appellant's lien accrued, the mortgagor had already pledged its property; of necessity appellant's lien could only fasten upon the mortgagor's rights as they then existed.

American National Bank v. Northwestern Mutual Life Insurance Co., C. C. A., 8th Cir., 89 Fed. 610, citing page bottom 614.

The fund in question accumulated in the hands of the court. Neither the Trust Company nor the appellant

obtained a lien on this fund. The Trustee might have impounded it as income. (*Atlantic Trust Co. v. Dana,* 128 Fed. 209), but did not do so. This fund was not the property of the Transit Company, and hence appellant did not have a lien upon it, for appellant's only lien is that of the statute, which purports to give a lien only upon the property of the defendant; and which purports further, we might add, to give a lien only upon the corpus of the defendant's property. The fund in question was a trust fund, at all times in the sole control, and at the sole disposal of the court. It was in *custodia legis,* and the lien of the statute could not reach it. Such a fund is held and is to be distributed according to the principles of equity, and as such equities existed at the beginning of the action.

Mercantile Trust Co. v. Southern States Land & Timber Co., C. C. A., 5th Cir., 86 Fed. 711, citing page 721.

Statutes like that of 1913, heretofore quoted, only extend to, and create a lien upon, the corpus of a defendant's property. They are of no further or higher force and effect than a mortgage executed by a mortgagee upon the body of his property. It is not the intent of such statutes to create liens upon funds accumulated by courts in equity proceedings, and which funds are being handled and distributed by such courts according to the principles of equity. Such funds, indeed, as has heretofore been pointed out, are not the property of the de-

fendant, but constitute a fund of a trust nature, to be disbursed to creditors by the court and as the principles of equity may require. A clear distinction exists between right of priority to or in a fund, and a lien on the fund. It must be, that under statutes which give judgments for damages priority over existing mortgages, that the result can be no different than if the statute made second mortgages for some things prior to a first mortgage. In neither case would the statute or second mortgage be construed to be a lien of its own vigor on a fund accumulated by and in the hands of the court, but they would have priority, and be entitled to first payment, and in full, from the assets.

Had neither party hereto taken any action in the receivership proceeding to impound the fund by intervention, such fund would have been held by the court and distributed by it in due time as the court might determine priorities.

In *Hitz v. Jenks*, 123 U. S., page 297, it is said:

> "It is argued for the appellant that by the rule affirmed in *Teal v. Walker*, 111 U. S. 242, a mortgagee is not entitled to rents and profits until he has been lawfully put in possession of the land; and that Keyser, having been admitted into possession by Hitz only, cannot hold the rents and profits against Mrs. Hitz. The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agree-

ment with Hitz; but the Court, through Keyser, as its receiver, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit."

Also in the case of *Shepherd v. Pepper,* 133 U. S. 626, citing page 652, the court says:

> "The court, through its receiver, took possession of the rents in order to preserve them for that party to the suit who should ultimately be found to be equitably entitled to them."

Prior to the intervention of appellant, she occupied, as to the appellee Trust Company, the position of a mortgagee in a second mortgage on real estate. Both appellant and the Trust Company were lien holders on the corpus of the property, and in the absence of any other parties were entitled to share in the proceeds of the estate in the order of their priority. Now by intervening on the first day of April, 1920, did the appellant, who held a second lien on the property which had earned the fund, and who had no lien on the fund, acquire by intervention a right to the fund, superior to the trustee who held a first lien on the property We think it could hardly be that by such intervention appellant could obtain any right whatever on the fund theretofore accumulated, but could only at most impound the income from the date of intervention onward. On what theory of law could appellant, who held a second lien on the corpus of the property, by the mere process of interven-

tion, fix a first lien on a fund already accumulated in the hands of the court? Prior to intervention appellant had no lien on this fund, and surely by intervening she could acquire no lien. Her entire rights were secondary and inferior. If it be that the holder of a first and prior mortgage lien must , in order to acquire a lien upon the income as such, impound such income by adequate proceeding, and if this can only apply to income thereafter accruing, how much more must the same principle apply to one who holds a second lien on the body of the property, but who, like the first mortgagee, has no lien on the income? It would of necessity appear to be true that what would apply to a mortgagee holding a first lien would also apply to a mortgagee or lien holder having a second right, and that if the prior lien holder, as just stated, in order to fasten a lien upon the income, must take some action toward impounding such income, then, as already stated, certainly the holder of a second lien can only hold the income after he has taken such action. It would further unquestionably be true, as stated by Judge Van Deventer, in the case cited, supra, that the prior mortgagee having a vested right to come in and impound the income, that when he did do so, such right would supersede any impounding theretofore made by one holding a second lien and who was second in right.

It would appear therefore that neither the Trustee nor the appellant had a lien upon the fund accumulated in the hands of the court; that appellant's right to an

equitable lien must be confined to income as such, and to income after impounding by her and prior to the time when the Trust Company impounded the income. This income, as appears from the record, has already been paid to the appellant.

Whether the Trust Company was entitled to the accumulated fund or the Light Company was entitled to it, is not material here, as neither has appealed. The only question presented upon this appeal is as to whether this fund should have been paid, and at that time, to the appellant. The court ordered the fund used to preserve the property. As the appellant was not entitled to the fund, and would not receive it on the final winding up of the receivership proceedings, and as neither the Trustee nor the Light Company have complained, the appeal must fail.

There is no evidence in the record as to the value of the property of the Transit Company, but it does appear that the company owns about four miles of track, some cars, and a city lot. The city of Tucson, where this company does business, has a population of approximately twenty thousand. We think it a fair inference, to be deduced from this evidence, together with the fact that the company has been unable to earn interest for the bondholders since 1906, that the property is not sufficient in value to pay the bondholders, principal and interest; in other words, to satisfy the first and prior lien on the property. It would follow, therefore, that

if the fund in question were diverted to pay the appellant's claim, that money necessary to satisfy the claim of the first lienor would be paid to satisfy a claim of a second lienor, neither party having impounded the fund as it accumulated, and it having passed from a technical income into a fund to be distributed by the court either in final winding up according to priorities, or for the preservation of the estate.

As stated in a case. cited by appellant, *Fosdick v Schall*, 9 Otto 235, "He (receiver) holds, pending the litigation, for the benefit of whosoever in the end it shall be found to concern. That in the meantime the court proceeds to determine the rights of the parties upon the principle it would if no change of possession had taken place." If no change in possession had taken place in this case, certainly the Trustee, with a first lien upon all the property, would have been entitled to priority to the proceeds from all the property before the appellant, with a second lien, would have been entitled to anything.

The contention of appellant, as set forth in Paragraph three, on page 27 of her brief, is that the Statute of Arizona of 1913, already cited, namely, Sec. 3634, of its own vigor, gave her a lien on the fund in question superior to that of the Trustee's. We think this contention incorrect, and not sustained by the authorities cited. As before pointed out, the statute is only effective as to mortgages executed after 1913; as to mortgages executed prior thereto, it does not purport to affect. As

all of the property of the Transit Company was covered by the mortgage here, the statute has no application. But the cases cited by appellant sustain the contentions heretofore made by us in this brief.

In *Thomas v. Cincinnati N. O. & T. P. Ry. Co.,* 91 Fed. 202, opinion by Taft, Circuit Judge, the facts were: Under the Enabling Act of Kentucky of 1872, under which the Cincinnati Railway was built through that state, local creditors obtaining judgments against a lessee of the road for wages, material or supplies, or for damages or injuries to persons, were *given a priority,* in the nature of a lien on the rolling stock, superior to any mortgage thereon. Under the Tennessee Act of 1877, relating to railroad companies, and under which one of the railroads in question in the suit was built, local creditors for wages, supplies, damages or injuries, were given *a priority* over mortgages.

Thomas v. Cincinnati, etc., 91 Fed. 195-196.

These acts were passed long prior to the time when the questions involved in the case arose. By the operation of the road a surplus fund had accumulated in the hands of the receiver, and the question arose whether or not this fund was for distribution to creditors generally, or whether the whole of it should be applied to the local creditors claiming priority by virtue of the statutes giving them a preference. The question is entirely one of priorities. The court, after commenting upon the facts, and stating that his first impressions as to the law were erroneous, says:

"Now a creditor's bill is merely an equitable levy and execution for the benefit of all creditors, secured and unsecured, and the question of priority is to be settled in the same manner as if execution at law had been levied, at precisely the same time, as upon judgments duly rendered, for all claims found by the court to be just. By such an equitable levy and execution as the filing of this bill and the seizure of the property, therefore, the judgments in Tennessee and Kentucky of the favored class are given a priority very like that of a senior lien over the trustees' lien, upon the property of the defendant company in those states, and the trustees have a lien prior to the lien of all other creditors. The surplus of earnings from the operation of the railroad property, over and above the cost of operating, belongs to the creditors, for whose benefit the creditors' bill has been filed in the same order of priority as must be preserved upon the principles of equity in the distribution of the proceeds of the property operated upon sale. This must be so. Otherwise the operation of the property could not be for the equal benefit of all creditors.

"It follows, therefore, that because, out of the proceeds of sale of 187/338 of the leasehold and rolling stock of the defendant company, the Tennessee creditors must be paid prior to mortgage or lien claims of the trustees for rent, and to all other claims, they must be accorded the same priority in

respect of that same proportion of the net earnings."

Applying this reasoning to the facts here, it must follow that appellant would not be entitled to the fund in question. The statute in Arizona is just the opposite of that in Tennessee and Kentucky, and in effect provides that judgments for personal injuries shall not be prior to mortgages executed prior to the passage of the Act. The Trustee's lien therefore and claim is a senior lien and superior to the ordinary judgment lien of the appellant. The surplus earnings, therefore, would be applied to the payment of the senior and prior lien and claim, the same as would be done out of the proceeds of a sale of the corpus of the property.

The statement quoted by appellant from *Wiswall v. Sampson,* 14 Howard, 52, on page 32 of her brief, but adds force to our contention. The law gives priority to the senior lien, namely that of the Trustee, which lien equity will not destroy. On the same page we note a statement, made by appellant, to this effect, speaking of a receiver: "Money in his hands is in *custodia legis* for whoever can make out a title to it." We think this is correct. Such a fund is not the property of defendant in the receivership proceedings, as we have already pointed out. It is a trust fund in the hands of the court, and to be distributed as the court may direct, according to the principles of equity. We find, upon looking up the case of *Booth v. Clark,* 17 Howard, 332, citing page 331, that the statement, "The money in his hands is in *custodia legis* for whoever can make out a

title to it," is an extract from the opinion of the court in that case.

The case of *American Bridge Co. v. Heidelbach,* 94 U. S. 798, quoted in full by appellant in her brief, is not in point. In that case, default was made in a mortgage, and the mortgagee filed his bill, setting forth that the company had on hand money and claims due to it, *and which had accrued and accumulated prior to the petition for an appointment of receiver,* and which he prayed might be applied to his mortgage. It was held that in as much as the mortgagee had not taken possession, his claim to the earnings and income on hand at the time of filing the bill must be postponed to an execution of a judgment creditor. This case and a long line of cases in the Supreme Court of the United States following it, namely, *Teal v. Walker*, 111 U. S. 242, and many others, are all to the effect that a mortgagee, in order to become entitled to the rents and profits, must take possession. But that is not the case here. The fund in controversy here did not exist at the time the receiver was appointed. This fund consists of money accumulated by the receiver in the operation of the property. The case of *American Bridge Co., Teal v. Walker,* and other cases of like kind, are clearly distinguished by the Supreme Court of the United States, in *Hitz v. Jenks*, 123 U. S., page 297, citing page 306, where it is said:

> "It is argued for the appellant that by the rule affirmed in *Teal v. Walker*, 111 U. S. 242, a mortgagee is not entitled to rents and profits until he has

been lawfully put in possession of the land; and that Keyser, having been admitted into possession by Hitz only, cannot hold the rents and profits against Mrs. Hitz. The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agreement with Hitz; but the court, through Keyser, as its receiver, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit, etc."

We do not agree with counsel for appellant as to their conclusions in the forfeiture of the Transit Company's franchise. The right of forfeiture is one of contract, and we do not believe that right is impaired or rendered unenforceable by receivership proceedings. The money expended by this court for such a purpose is in the nature of money expended to prevent waste and dissipation of the company's assets, and for such purposes we believe the court may even go to the extent of displacing prior liens.

There is also excellent authority that the Light Company, by reason of its creditor's bill, has a claim on the fund in question.

Sage v. Memphis & Little Rock R. R. Co., 125 U. S. 361.

It must follow from what has been said, and under the facts here, appellant was not entitled to the surplus

earnings accumulated by the court prior to the intervening petition of appellant, and this being the only error assigned and no other person complaining, the judgment of the lower court should be affirmed.

Respectfully submitted.

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